A **IKI PUTRA MUBARRAK v. KERAJAAN NEGERI SELANGOR**

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR FCJ
[ORIGINAL JURISDICTION NO: BKA-3-11-2019(W)]
14 MAY 2020

B

CIVIL PROCEDURE: *Proceedings – Leave – Application for leave to commence proceedings – Application under art. 4(4) of Federal Constitution – Constitutionality of impugned provision under s. 28 of Syariah Criminal Offences (Selangor) Enactment 1995 – Allegation that impugned provision made by State*
C *Legislature invalid – Complaint involved question of competency of State Government to legislate matter on Federal List – Whether a constitutional requirement that State Government be heard in defence of validity of statutory provision being impugned – Whether leave required and necessary – Whether application frivolous and an abuse of court process – Whether application fulfilled*
D *requirements of art. 4(3) of Federal Constitution – Whether application for leave ought to be granted*

CONSTITUTIONAL LAW: *Legislature – Impugned provision – Constitutionality of impugned provision under s. 28 of Syariah Criminal Offences (Selangor) Enactment 1995 – Allegation that impugned provision made by State Legislature*
E *invalid – Whether impugned provision consistent with item 1, List II (State List), Ninth Schedule of Federal Constitution – Whether Legislature of State of Selangor ('LSS') made provision with respect to matter to which it had no power to make laws – Whether null and void – Whether a constitutional requirement that State Government be heard in defence of validity of statutory provision being impugned*
F *– Federal Constitution, arts. 3, 11(4) & 74 – Penal Code, s. 377A*

The Syariah Prosecutor proffered a charge against the applicant in the Selangor Syariah High Court, alleging that the applicant had attempted to commit sexual intercourse against the order of nature with certain other male persons. The charge was that the applicant had attempted to commit an
G offence punishable under the Syariah Criminal Offences (Selangor) Enactment 1995 ('Enactment'). The relevant offence that the applicant was alleged to have attempted to commit was contained under s. 28 of the Enactment ('the impugned provision'). The applicant pleaded not guilty to the charge. His trial in the Syariah Court had been stayed pending the
H outcome of this application on the challenge he was making with respect to the constitutionality of the impugned provision in the Enactment with which he was being charged under. The applicant made an application for, among others, leave to commence proceedings against Kerajaan Negeri Selangor ('respondent') be given pursuant to art. 4(4) of the Federal Constitution
I ('FC'). It was in the exercise of the Federal Court's original jurisdiction under

arts. 4(3) and 128(1)(a) of the FC by way of a petition for a declaration that the impugned provision was invalid on the ground that the Legislature of the State of Selangor ('LSS') made provision with respect to a matter to which it had no power to make laws and was therefore null and void. The respondent raised a preliminary objection ('the PO') in that the applicant had wrongly named Kerajaan Negeri Selangor as respondent in this action because the Kerajaan Negeri Selangor had no jurisdiction to execute, enforce or prosecute under the Enactment. Thus, the application was defective and should be struck out *in limine*. In opposing the application, the respondent averred, among others, that the impugned provision was not inconsistent with item 1, List II (State List), Ninth Schedule of the FC and was consistent with art. 74(2) of the FC. While the Enactment was only applicable to Muslims, ss. 377 until 377E of the Penal Code were applicable to all citizens of the country. Articles 3, 11(4) and 74 of the FC conferred power upon the State Legislature to make laws with respect to any of the matters enumerated in the State List or the Concurrent List. Muslims are subject to both laws enacted by the Parliament and State Legislative. Therefore, LSS had the power to make the impugned provision and the Head of Syarie Prosecutor had power to enforce the same upon Muslims.

Held (granting leave for application)
Per Abang Iskandar FCJ delivering the judgment of the court:

(1) By the very wordings of art. 4(4) of the FC, where a challenge is mounted premised upon the allegation that the impugned provision was made by a State Legislature upon a matter for which the State Legislature was incompetent to so legislate, it is expressly provided that in such a situation, the relevant State Government must be served with the cause papers so that it could be heard by submitting during the leave application. In the context of this application, the naming of the Government of the State of Selangor had complied with the dictates of the said art. 4(4) of the FC. It is a constitutional requirement that the State Government of the relevant State be heard in defence of the validity of the statutory provision that is being impugned. Thus, the PO raised clearly had lacked any merit and ought to be dismissed. (paras 10 & 11)

(2) The pivotal issue here was whether in legislating the impugned provision, the LSS was competent to do so, in light of the Federal List, in particular, item 4(h) which itemised criminal law as a matter that is expressly enumerated under that List I, namely the Federal List or a matter dealt with by Federal law. As a statement of general principle, the contention that Muslims in Malaysia are subject to two sets of law is not necessarily incorrect, *ipso facto*. But that would be subject to the overarching caveat that in so far as they are being subject to Muslim law,

A the Muslim law that sought to bind them must first be constitutionally legislated. This was so because although the State Legislature is clothed with the power to legislate on matters that pertain to the precepts of Islam, that very same power is subject to what may be termed as a preclusion clause which is expressly provided for inside the enabling B item 1, of the State List itself. (paras 24 & 26)

(3) Leave was indeed necessary for this application before this complaint by the applicant could find its way to be fully argued and ventilated before the Federal Court. Leave was necessary because it involved a challenge premised on whether the LSS was legislatively competent when it C enacted the impugned provision, in light of the fact that s. 377A of the Penal Code appeared to be already in place when the former (impugned provision) was enacted by the LSS, and the latter being a Federal legislation legislated pursuant to item 4(h) of the Federal List under the FC. As such, leave of the court was required under art. 4(4) of the FC D and this application had fulfilled the requirements of art. 4(3) of the FC in that it being a challenge premised on an alleged lack of competency on the part of LSS to enact the impugned provision. There were merits in this application that were quite apparent in the contentions of the applicant which deserved mature ventilation before the full court on the constitutionality and validity of the impugned provision. (paras 31 & 32) E

(4) This application had fulfilled the two requirements, namely (i) that leave was required and necessary as the applicant had shown that this complaint of his involved the question of competency of the LSS to legislate on a matter that was on the Federal List; and (ii) this application F was not frivolous or an abuse of the court process. Leave ought to be granted in this application so as to allow, borrowing the words in the case of *Mamat Daud* (1986), 'the applicant should be allowed to canvass their case before the full court on the constitutionality and validity' of the impugned provision. (para 35)

G ***Bahasa Melayu*** *Headnotes*

Pendakwa Syariah mengemukakan pertuduhan terhadap pemohon di Mahkamah Tinggi Syariah Selangor, dengan dakwaan pemohon cuba melakukan hubungan seksual di luar tabii dengan beberapa lelaki lain. Pertuduhan adalah bahawa pemohon telah mencuba melakukan kesalahan H yang boleh dihukum bawah Enakmen Kesalahan Jenayah Syariah (Selangor) 1995 ('Enakmen'). Kesalahan relevan yang didakwa dilakukan oleh pemohon terkandung bawah s. 28 Enakmen ('peruntukan yang dipertikaikan'). Pemohon mengaku tidak bersalah atas pertuduhan tersebut. Perbicaraan tertuduh di Mahkamah Syariah digantung sementara menunggu keputusan permohonan I ini atas cabaran oleh tertuduh berhubungan perlembagaan peruntukan yang

dipertikaikan dalam Enakmen yang dituduh terhadapnya. Pemohon memohon, antara lain, kebenaran memulakan prosiding terhadap Kerajaan Negeri Selangor ('responden') diberikan menurut per. 4(4) Perlembagaan Persekutuan ('PP'). Adalah dalam pelaksanaan bidang kuasa asal Mahkamah Persekutuan bawah per. 4(3) dan 128(1)(a) PP melalui petisyen untuk pengisytiharan bahawa peruntukan yang dipertikaikan tidak sah atas alasan Badan Perundangan Negeri Selangor ('BPNS') memperuntukkan peruntukan berkenaan perkara yang di luar kuasanya untuk menggubal undang-undang dan oleh itu, adalah terbatal dan tidak sah. Responden membangkitkan bantahan awalan ('BA') bahawa pemohon telah dengan salah menamakan Kerajaan Negeri Selangor sebagai responden dalam tindakan ini kerana Kerajaan Negeri Selangor tidak mempunyai bidang kuasa untuk melaksanakan, menguatkuasakan atau mendakwa bawah Enakmen. Oleh itu, permohonan adalah defektif dan harus dibatalkan *in limine*. Membantah permohonan ini, responden menghujahkan, antara lain, bahawa peruntukan yang dipertikaikan bukan tidak konsisten dengan item 1, Senarai II (Senarai Negeri), Jadual Kesembilan PP dan adalah konsisten dengan per. 74(2) PP. Sementara Enakmen hanya diguna pakai pada orang Islam, ss. 377 sehingga 377E Kanun Keseksaan diguna pakai kepada semua warganegara di negara ini. Perkara 3, 11(4) dan 74 PP memberi kuasa kepada Badan Perundangan Negeri untuk menggubal undang-undang berkenaan apa-apa perkara yang terhitung dalam Senarai Negeri atau Senarai Bersama. Orang Islam tertakluk kepada kedua-dua undang-undang yang digubal oleh Parlimen dan Badan Perundangan Negeri. Oleh itu, BPNS mempunyai kuasa untuk menggubal peruntukan yang dipertikaikan dan Ketua Pendakwa Syarie mempunyai kuasa untuk menguatkuasakannya atas orang Islam.

Diputuskan (memberikan kebenaran untuk permohonan)
Oleh Abang Iskandar HMP menyampaikan penghakiman mahkamah:

(1) Melalui kata-kata per. 4(4) PP, apabila bantahan dibuat berdasarkan dakwaan peruntukan yang dipertikaikan digubal oleh Badan Perundangan berkenaan perkara yang Badan Perundangan tidak kompeten untuk menggubal perundangan, jelas dinyatakan dalam situasi sebegitu, Kerajaan Negeri yang relevan harus diserahkan dengan kertas-kertas kausa agar Badan Perundangan boleh didengar melalui hujahan semasa permohonan kebenaran. Dalam konteks permohonan ini, penamaan Kerajaan Negeri Selangor telah mematuhi apa yang ditentukan oleh per. 4(4) PP. Ini adalah satu keperluan perlembagaan supaya Kerajaan Negeri dari negeri relevan dapat didengar dalam mempertahankan kesahihan peruntukan statutori yang dipertikaikan. Oleh itu, BA yang dibangkitkan jelas tidak mempunyai merit dan harus ditolak.

(2) Isu penting yang timbul di sini adalah sama ada apabila menggubal peruntukan yang dipertikaikan, BPNS kompeten untuk berbuat demikian, berdasarkan Senarai Persekutuan, khususnya item 4(h) yang memperincikan undang-undang jenayah sebagai perkara yang dihitung dengan jelas bawah Senarai I, iaitu Senarai Persekutuan atau perkara yang ditangani oleh undang-undang persekutuan. Sebagai penyataan prinsip umum, hujahan bahawa orang Islam di Malaysia tertakluk pada dua jenis undang-undang tidak *ipso facto* salah. Tetapi itu tertakluk pada peringatan menyeluruh bahawa setakat mereka tertakluk pada undang-undang Islam, undang-undang Islam yang mengikat mereka pertama sekali mesti digubal secara berperlembagaan. Ini adalah kerana walaupun Badan Perundangan diberi kuasa menggubal undang-undang mengenai perkara-perkara yang berkaitan dengan ajaran Islam, kuasa yang sama tertakluk pada apa yang boleh disebut sebagai klausa penutupan yang secara jelas diperuntukkan dalam membolehkan item 1, Senarai Negeri itu sendiri.

(3) Kebenaran diperlukan untuk permohonan ini sebelum aduan oleh pemohon boleh dihujahkan dan dipertimbangkan sepenuhnya di hadapan Mahkamah Persekutuan. Kebenaran diperlukan kerana melibatkan premis yang dicabar sama ada BPNS kompeten dari segi undang-undang apabila menggubal perundangan yang dipertikaikan, berdasarkan fakta bahawa s. 377A Kanun Keseksaan nampaknya sudah bertempat apabila peruntukan yang dipertikaikan itu digubal oleh BPNS, dan s. 377A sebagai peruntukan perlembagaan yang digubal menurut item 4(h), Senarai Persekutuan bawah PP. Oleh itu, kebenaran mahkamah diperlukan bawah per. 4(4) PP dan permohonan ini memenuhi keperluan-keperluan per. 4(3) PP kerana sebagai bantahan berdasarkan dakwaan tiada kekompetenan oleh BPNS untuk menggubal peruntukan yang dipertikaikan. Terdapat merit-merit dalam permohonan ini yang agak jelas dalam hujahan-hujahan pemohon yang wajar menerima pertimbangan matang di hadapan mahkamah penuh atas perlembagaan dan kesahan peruntukan yang dipertikaikan.

(4) Permohonan ini telah memenuhi dua keperluan, iaitu (i) permohonan diperlukan dan penting kerana pemohon telah menunjukkan aduannya melibatkan persoalan kekompetenan BPNS untuk membuat perundangan mengenai sesuatu perkara yang terdapat dalam Senarai Persekutuan; dan (ii) permohonan ini tidak semberono atau satu penyalahgunaan proses mahkamah. Kebenaran harus dibenarkan dalam permohonan ini untuk membenarkan, mengikut kata-kata dalam kes *Mamat Daud* (1986) 'pemohon boleh dibenarkan meneliti kes mereka di hadapan mahkamah penuh berkenaan perlembagaan dan kesahan' peruntukan yang dipertikaikan.

Case(s) referred to:

Ah Thian v. Government Of Malaysia [1976] 1 LNS 3 FC ***(refd)***

East Union (Malaya) Sdn Bhd v. Government Of State Of Johore & Government Of Malaysia [1980] 1 LNS 18 FC ***(refd)***

Mamat Daud & Ors v. The Government Of Malaysia [1986] 2 CLJ 118; [1986] CLJ (Rep) 190 SC ***(refd)***

Mamat Daud & Ors v. The Government Of Malaysia [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC ***(refd)***

Ramasamy Shanmugam v. The State Government Of Penang & Anor [1986] 2 CLJ 121; [1986] CLJ (Rep) 238 ***(refd)***

Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC ***(refd)***

ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener) [2015] 8 CLJ 621 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 3, 4(3), (4), 11(4), 74(2), 75, 128(1)(a), Ninth Schedule List I item 4(h), List II item 1

Penal Code, ss. 298A, 377, 377A, 377C, 377D, 377E

Syariah Criminal Offences (Selangor) Enactment 1995, s. 28

For the appellant - Surendra Ananth; M/s Tan Law Practice

For the respondent - Masri Mohd Daud & Siti Fatimah Talib; SLA

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar FCJ:

Background Facts Of Case

[1] On 21 August 2019, the Chief Syarie Prosecutor through the Syariah Prosecutor decided to proffer a charge against Iki Putra bin Mubarrak ("the applicant") in Selangor Syariah High Court No: 10100-153-0020-2019.

[2] In essence, it was alleged that the applicant had on 9 November 2018, between 9pm to 10.30pm in a house in Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons.

[3] The charge was that the applicant had attempted to commit an offence punishable under the Syariah Criminal Offences (Selangor) Enactment 1995 (the "Enactment"). The relevant offence that the applicant was alleged to have attempted to commit was contained under s. 28, of the Enactment (the "impugned provision"). The applicant pleaded not guilty to the charge. His trial in the Syariah Court has been stayed pending the outcome of this application on the challenge he is making with respect to the constitutionality of the impugned provision in the Enactment with which he is being charged under.

A **The Leave Application**

[4] The applicant, through the notice of motion dated 28 November 2019, made an application from this court for, among others, leave to commence proceedings against Kerajaan Negeri Selangor ("the respondent") be given pursuant to art. 4(4), of the Federal Constitution ("the FC"). It is in the
B exercise of the Federal Court's original jurisdiction under arts. 4(3) and 128(1)(a) of the FC by way of a petition for a declaration that the impugned provision is invalid on the ground that the Legislature of the State of Selangor ("LSS") makes provision with respect to a matter to which it has no power to make laws and is therefore null and void.

C **Basis For The Challenge**

[5] In support of the leave application, the applicant, *vide* his affidavit in support dated 28 November 2019, grounded his application on the following grounds:

D (i) In item 1, List II (State List), Ninth Schedule of the FC allows the LSS to make laws on the "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List" (read together with art. 74 of the FC).

E (ii) The impugned provision was made pursuant to this legislative field. However, the impugned provision is a matter included in the Federal List, specifically, item 4(h), List I (Federal List), Ninth Schedule of the FC, that is the "creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law".

F (iii) The impugned provision is dealt with by a Federal law, that is the Penal Code specifically ss. 377 to 377E, either one or all of them.

(iv) In any event, the impugned provision is a matter that can be dealt with under federal law, as it falls within the ambit of criminal law in item
G 4, List I (Federal List), Ninth Schedule of the FC, which includes all matters that could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere.

(v) Further and/or alternatively, the impugned provision is in pith and
H substance concerning matters already dealt with under the Penal Code (Act 574) and/or can be dealt with under Federal law.

(vi) In view of the foregoing, the impugned provision is beyond the legislative competence of the LSS.

I

[6] In the afidavit jawapan responden (encl. 18), affirmed by Abu Bakar bin Daud, the State of Selangor, Head of Syarie Prosecutor, the respondent raised preliminary objection ("the PO") in that the applicant had wrongly named Kerajaan Negeri Selangor as respondent in this action because Kerajaan Negeri Selangor has no jurisdiction to execute, enforce or prosecute under the Enactment. Thus, the application is defective and should be struck out *in limine*.

[7] In opposing the application, in brief, the respondent averred, among others, that the impugned provision is not inconsistent with item 1, List II (State List), Ninth Schedule of the FC and is consistent with art. 74(2) of the FC. While the Enactment is only applicable to Muslims, ss. 377 until 377E of Penal Code are applicable to all citizens of the country.

[8] Articles 3, 11(4) and 74 of the FC confer power upon the State Legislature to make laws with respect to any of the matters enumerated in the State List (that is to say, the List II set out in the Ninth Schedule) or the Concurrent List. Muslims are subject to both laws enacted by the Parliament and State Legislative. Therefore, LSS has power to make the impugned provision and the Head of Syarie Prosecutor has power to enforce the same upon Muslim.

Deliberations And Findings

[9] As indicated earlier, the respondent had raised two issues. Firstly, with regard to the PO and secondly as a reply to the applicant's application. I shall deal with the PO first. The PO was based on the contention by the respondent that other parties ought to be made parties in this application and that the omission on the part of the applicant to do so was fatal. Learned counsel for the respondent submitted that Majlis Agama Islam Selangor ("MAIS") and/or Jabatan Agama Islam Selangor ("JAIS") ought to be made parties to this proceedings. Reason being that, these bodies have better understanding on the matter at hand as they are concerned with the actual prosecution of the applicant in the Syariah Court. Learned counsel for the applicant replied to the effect that those bodies were the implementing agencies of the Enactment which houses the impugned provision, namely s. 28 which creates the offence of unnatural sex acts, for being acts against the precepts of Islam.

[10] Having considered the respective submissions, I agree with the contention of learned counsel for the applicant that by the very wordings of art. 4(4) of the FC, where a challenge is mounted premised upon the allegation that the impugned provision was made by a State Legislature upon a matter for which the State Legislature is incompetent to so legislate, it is expressly provided that in such a situation, the relevant State Government must be served with the cause papers so that it could heard by submitting

during the leave application. In the context of this application, the naming of the Government of the State of Selangor had, to my mind, complied with the dictates of the said art. 4(4) of the FC. In other words, it is a constitutional requirement that the State Government of the relevant State be heard in defence of the validity of the statutory provision that is being impugned. I also agree with learned counsel for the applicant that as this is only an application for leave, other parties may apply to be made as interveners if they are of the view that they have legitimate interest, during the ventilation of the petition proper in the event that this application for leave is allowed. At this stage, we are concerned only with the issue of whether leave ought to be granted to ventilate further on the question of whether the impugned provision was properly enacted by the respondent in the first place. Put in another way, whether the LSS was competent to enact the impugned provision, *to wit*, s. 28 of the Enactment.

[11] Premised on the considerations above-stated, I find that the PO raised by the learned Senior Federal Counsel ("SFC") clearly, with respect, has lacked any merit and I therefore hereby dismiss it.

[12] In relation to the submissions on the main application, the respondent submitted that this application for leave was frivolous and deserved to be dismissed.

[13] It must be recalled that this has been an application for leave before a Federal Court Judge sitting alone and made pursuant to art. 4(4) of the FC. I must hasten to add that this is the correct approach to be pursued in this case because, in essence, it has involved the question of whether the LSS has in fact, when enacting the impugned provision in the said Enactment of 1995, transgressed into List I, the Federal List of the FC. This relates to a competency issue, in the sense that it involves the question of whether the Federal Parliament or a State Legislature having passed laws on a matter that does not belong in their respective Lists.

[14] In the context of this application, the complaint by the applicant was that the LSS had in fact transgressed beyond and into the Federal List when it legislated the impugned provision as contained in the Enactment. Perhaps, it would be opportune to reproduce the submissions as they were articulated on behalf of the applicant, thus:

> 6.2. The Impugned Section was enacted under the legislative field of precepts of Islam. The said field however has an express preclusion clause which states, **"except in regard to matters included in the Federal List"**.
>
> 6.3. Item 4(h), Federal List provides:
>
> 4. Civil and criminal law and procedure and the administration of justice, including:

(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

6.4. The subject matter of the Impugned Section, that is "Sexual intercourse against the order of nature" is a matter "dealt with by federal law".

a. ...

b. ...

c. ...

6.5. As is apparent, the Penal Code already deals with the subject matter of the Impugned Section. This in itself ousts the legislative competency of the SSL to make laws on the matter ...

6.6. In any event, the subject matter of the Impugned Section falls within Parliament's exclusive power over "criminal law".

a. The term "criminal law" traditionally referred to acts and omissions that are prohibited by penal provisions. However, as recognised by this court in *Sulaiman Takrib*, the said definition is too wide and would render all offences as "criminal law" ...

b. This was also a problem in Canada, which similarly being a federation with a division of legislative power between its Federal Parliament and the provincial legislatures. As in Malaysia, if there is a conflict between a federal law and a provincial law, the former prevails and the latter is displaced. Furthermore, criminal law is a matter within the domain of the Federal Parliament. The Canadian cases are therefore instructive in looking at the legislative field of "criminal law"...

c. The Canadian Supreme Court recognised the problem with the traditional definition of "criminal law" which was too wide and would allow the Federal Parliament to colourably legislate on matters in the Provincial List under the guise of "criminal law" ...

d. In summary, for a law to be a valid criminal law, it must have a valid public purpose. This was expanded further by the Canadian Supreme Court in *Reference re Assisted Human Reproduction Act* [2010] 3 SCR 457, ...

e. In essence, a valid "criminal law" must be a law which: first. Provides for an offence; second, is backed by a penalty; and third, has a criminal law purpose, that is to address a public concern relating to peace, order, security, morality, health or some similar purpose.

f. There is no reason why this definition should not be adopted in Malaysia. The existence of the Islamic criminal law system in its current form does not detract from this conclusion. The FC enables

A the creation of such a system purely for personal law purposes. This was judicially recognised by this Honourable Court in *Indira Gandhi alp Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545, ...

6.7. In striking a balance with the legislative field on precepts of Islam in
B Item 1, State List, the preclusion clause (as to matters in the Federal List) is critical.

a. There is no need to deal with the question of what precepts of Islam means. No matter how widely the term is defined, the legislative power to create offences against precepts is circumscribed by the
C preclusion clause that is matters in the Federal List which includes "criminal law".

b. When the offence sought to be created by the State Legislatures pursuant to Item 1, State List pertains to what could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public
D sphere, State Legislatures cease having the power to do so. It is in this way that power to create personal law offences under Item 1, State List is balanced against the power to create (or not create) offences in the public sphere under Item 4, Federal List.

6.8. The subject matter of the Impugned Section, that is sexual intercourse
E against the order of nature, arguably has a valid criminal law purpose.

a. Sections 377 and 377A, Penal Code were present in the code prior to independence. The Penal Code was substantially based on the Indian Penal Code 1860.

b. Sexual intercourse against the order of nature was dealt with under
F the former section 377 of the Indian Penal Code which provided:

> 377. Unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term which may
G extend to ten years, and shall also be liable to fine

c. The said section was based on English law at that material time. The purpose of the law was on the ground of morality as perceived at that material time ...

d. As noted above, this is a valid criminal law purpose.

H 6.9. As Parliament is empowered under item 4, Federal List to enact sections 377 and 377A, Penal Code, the SSL is necessarily precluded from doing so under Item 1, State List.

a. In *Mamat bin Daud v. Government of Malaysia* [1986] CLJ Rep 190; [1988] 1 MLJ 119, this court did not consider the preclusion the
I clause in Item 1, State List.

b. The majority found that the subject matter of the law in question, that is section 298A, Penal Code, was a matter that fell within a number of legislative fields that belong to the states, including Article 11 (4), FC ...

c. The majority found that the subject matter of section 298A, Penal Code, that is on religious doctrine, fell within the exclusive purview of the State Legislatures under various legislative fields which do not have a similar preclusion clause as in the precepts of Islam field.

d. In the present case, the Impugned Section only falls within the precepts of Islam legislative field. It is therefore caught by the preclusion clause. (emphasis added)

[15] Premised on the above, it was the contention of the applicant that there is merit in this leave application in that it was far from being a frivolous application or otherwise an abuse of the court process. It was one that merited further and fuller and mature ventilation in a substantive hearing, before a fuller Federal Court panel.

[16] On the other hand, the learned SFC had submitted before me that there was nothing amiss with the LSS legislating the impugned provision in the Enactment. The thrust of his submission had been that the impugned provision is not identical with the provision as contained under s. 377A of the Penal Code. He had pointed out that the two provisions under scrutiny were different even in the extent of their punishment provisions. He further contended, as could be seen in para. 24.8 of his written submissions where it was emphasised that there was nothing wrong as long as the accused person was not prosecuted twice for the same offence. I would translate this to mean that nothing would be amiss for a Muslim person alleged to have committed a sexual act against the order of nature to be prosecuted only under the impugned provision, as long as he is also not prosecuted under s. 377A of the Penal Code. I reproduce para 24.8 of his written submissions, below like so:

24.8. Seksyen 59 Akta 388 jelas menyatakan di mana satu perlakuan atau peninggalan adalah satu kesalahan di bawah dua atau lebih undang-undang bertulis, pesalah boleh didakwa dan dihukumi di bawah undang-undang yang mana satu, selagi beliau tidak didakwa dan dihukumi dua kali untuk kesalahan yang sama. Oleh yang demikian di mana pesalah melakukan kesalahan yang boleh dibicarakan sama ada oleh Mahkamah Sivil atau Mahkamah Syariah, beliau boleh didakwa dalam mana-mana mahkamah tersebut.

[17] Learned counsel for the applicant replied that the issue had concerned whether the LSS had, in the first place, the required power under the FC to even legislate the impugned provision. According to him, it was not, at least not at this stage, a question of its implementation. He relied on the doctrine of pith and substance in determining whether the LSS had legislated on a

matter that rightly, he had submitted, belonged in the Federal List of the FC. Based upon that doctrine, it was his submission before this court that when the LSS legislated the impugned provision, it was legislating on a matter that had touched on criminal law, a matter listed as item 4(h) of the Federal List.

[18] It was also contended by learned SFC that the Muslims in Malaysia are subject to two sets of laws, namely the civil law system which applies to everybody, as well as the Muslim law system. His argument had run like so:

> 24.1. Mahkamah Persekutuan telahpun memutuskan bahawa orang Islam bukan sahaja tertakluk kepada undang-undang awam yang digubal oleh Parlimen tetapi juga tertakluk kepada undang-undang Negeri yang bersifat keagamaan yang digubal oleh Badan Perundangan Negeri.
>
> 24.2. Perlembagaan telah memberikan kuasa kepada Badan Perundangan Negeri untuk menggubal dan menguatkuasakan undang-undang kesalahan terhadap orang-orang Islam.
>
> 24.3. Perlembagaan telah membenarkan orang-orang Islam di negara ini ditadbir oleh undang-undang peribadi Islam. EJSS 1995 hanya terpakai untuk orang-orang Islam di Negeri Selangor.
>
> 24.4. Oleh itu, orang-orang Islam adalah tertakluk kepada kedua dua undang-undang awam yang digubal oleh Parlimen dan juga undang-undang Negeri yang digubal oleh Badan Perundangan Negeri.
>
> 24.5. Peruntukkan seksyen 28 EJSS 1995 adalah sah dan tidak bercanggah dengan Item 1, Senarai II (Senarai Negeri), Jadual Kesembilan, Perlembagaan dan selari dengan Perkara 74 Perlembagaan Persekutuan.

[19] He had cited the case of *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621; [2016] 1 MLJ 153 where the apex court there had made the following remarks, which goes:

> [31] In conclusion we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by Legislature of a state. This is because the Federal Constitution allows the Legislature of a state to legislate and enact offences against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state.

[20] Having perused the submissions advanced by both learned counsel before me, I agree with learned counsel for the applicant that the submissions that essentially formed the reply by the respondent did not sufficiently, or at all, address the gravamen of the applicant's complaint. The applicant's

complaint sought to challenge the very issue of the competency of the LSS to even legislate the impugned provision for creating an offence under the Enactment. The applicant had alleged that the LSS had transgressed into the Federal List, by legislating on a matter on that list, or dealt with by Federal law, namely item 4(h) on List I of the FC. As could be seen in the preceding paragraphs, the learned SFC for the respondent, had submitted that the impugned provision in the Enactment, was not identical with the Federal law, as contained in the Penal Code, *to wit*, s. 377A of the Penal Code.

[21] At this juncture, it would help if the two provisions under scrutiny are reproduced for ease of reference. Section 28 of the Enactment reads as follows:

> Section 28. Sexual intercourse against the order of nature
>
> Any person who performs sexual intercourse against the order of nature with any man, woman or animal is guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

[22] Section 377A of the Penal Code reads as follows:

> Carnal intercourse against the order of nature
>
> 377A. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

[23] As the two provisions under scrutiny were not identical, it was submitted by learned SFC that this application was a frivolous one, devoid of any merit, and therefore ought to be dismissed with costs.

[24] To my mind, with respect, the pivotal issue here is whether in legislating the impugned provision, the LSS was competent to do so, in light of the Federal List, in particular item 4(h) which itemised criminal law as a matter that is expressly enumerated under that List I, namely the Federal List or a matter dealt with by Federal law. Whether or not the two above-quoted statutory provisions are not identical with each other, may be a relevant consideration, but definitely it is not a conclusive determinant factor in resolving the issue at hand, as raised in the applicant's complaint.

[25] The LSS had, as was submitted by the learned SFC, legislated the s. 28 on the basis that it had jurisdiction in legislating Islamic law, and that the impugned s. 28 was aimed at addressing unnatural sexual acts, as being acts which are against the precepts of Islam.

[26] As regards the contention by learned SFC that Muslims in Malaysia are subject to two sets of law, learned counsel for the applicant submitted that he had no quarrel with that, but not without qualification. With respect, I agree with him. As a statement of general principle, the contention that Muslims in Malaysia are subject to two sets of law is not necessarily incorrect, *ipso facto*. But that would be subject to the overarching caveat that in so far as they being subject to Muslim law, the Muslim law that seeks to bind them must first be constitutionally legislated. This is so because although the State Legislature is clothed with the power to legislate on matters that pertain to the precepts of Islam, that very same power is subject to what may be termed as a preclusion clause which is expressly provided for inside the enabling item 1, of the State List itself. Item 1 of the State List reads as follows:

> LIST II – STATE LIST
>
> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the DEFINITION and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, **except in regard to matters included in the Federal List;** the constitution, Organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (emphasis added)

[27] In this regard, it was submitted for the applicant that since the Federal Legislature, being the Parliament, had already legislated for offences aimed at criminalising sexual acts by man with animals and sexual acts by man with another person that go against the order of nature, the competency of the State Legislature to legislate like offences for sexual acts against the precepts of Islam, which are similar with the Federal criminal law provisions as contained in the Penal Code, are effectively precluded on account of the preclusion clause in item 1 in the State List.

[28] In *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54; [2009] 6 MLJ 354 ("*Sulaiman Takrib* case"), Abdul Hamid Mohamad CJ said:

> [72] Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in *Mamat bin Daud* too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. I would prefer that the issue be decided on a case to case basis. However, if for example, a similar offence has been created and is found in the federal law since even prior to the Merdeka Day that must be accepted as 'criminal law'. But, where no similar 'criminal law' offence has been created, then, as in the case of *Mamat bin Daud*, the court would have decide on it.

[29] In the circumstances of this present application, it was submitted by learned counsel for the applicant that in light of the existence of s. 377A of the Penal Code, a statute passed by the Federal Legislature, the impugned provision could not, in all probabilities, be regarded as having been constitutionally legislated by the LSS and is therefore invalid, null and of no effect.

[30] Now, what is the threshold that needed to be surpassed in an application for leave pursuant to an art. 4(4) of the FC? In the case of *Mamat Daud & Ors v. The Government of Malaysia* [1986] 2 CLJ 118; [1986] CLJ (Rep) 190; [1986] 2 MLJ 192, the leave panel there had shown what would be required of the applicant in order to be successful in such an application of this kind. Mohd Azmi SCJ had held as follows:

> For the applicants to succeed, they must satisfy the court firstly that leave is necessary under Article 4(4) and secondly, that they have an arguable case in that the application is not frivolous.

[31] Bearing that in mind, it is my finding that leave is indeed necessary for this application before this complaint by the applicant could find its way to be fully argued and ventilated before the Federal Court. Leave is necessary because it involves a challenge premised on whether the LSS was legislatively competent when it enacted the impugned provision, in light of the fact that s. 377A of the Penal Code appeared to be already in place when the former (impugned provision) was enacted by the LSS, and the latter being a Federal legislation legislated pursuant to item 4(h) of the Federal List under the FC. As such, leave of the court is required under art. 4(4) of the FC and this application has fulfilled the requirements of art. 4(3) of the FC in that it being a challenge premised on an alleged lack of competency on the part of LSS to enact the impugned provision (see *East Union (Malaya) Sdn Bhd v. Government Of State Of Johore & Government Of Malaysia* [1980] 1 LNS 18 FC; *Ramasamy Shanmugam v. The State Government Of Penang & Anor* [1986] 2 CLJ 121; [1986] CLJ (Rep) 238; and *Ah Thian v. Government Of Malaysia* [1976] 1 LNS 3 (FC).

[32] As to whether this application is a frivolous one, I had occasion to consider the submissions and the materials placed before me by both learned counsel and I am of the view that this has not been a frivolous application. In fact, far from it, there are merits that are quite apparent in the contentions of the applicant which, to my mind, deserve mature ventilation before the full court on the constitutionality and validity of the impugned provision. See, the then Supreme Court case of *Mamat Daud* case (1986) (*supra*) where it was held, *inter alia*, as the challenge mounted before the court for leave was concerned with the validity of the legislation on a matter with respect to which Parliament has no power to make law, such application on its facts should be allowed as it was not frivolous. The leave panel of the then apex court therefore granted the leave applied for so as to allow "the applicants to canvass their case before the full court on the constitutionality and validity of the new s. 298A of the Penal Code."

[33] Indeed, this application before me has been the opposite of what was challenged in the *Mamat Daud* case (1986) (*supra*) in that, if it is to be recalled, there it was the Federal Legislature, the Parliament that was alleged to have transgressed into a matter which would appear to be within the exclusive legislative domain of the State Legislature, *to wit*, a matter pertaining to Islamic law. Whereas in this instant case, it was the State Legislature (of Selangor) that was alleged to have transgressed into the exclusive legislative domain of Parliament on matters pertaining to criminal law as contained in item 4(h) of the List I, or a matter dealt with by Federal law, otherwise commonly referred to as the Federal List. I have deliberately used the words 'exclusive legislative domain' when referring to the Federal and State Lists. That is because there exists the List III, otherwise referred to as the Concurrent List in the FC, wherein matters, upon which both Federal and State Legislatures are competent to legislate on, are listed therein, for instance, matters on culture and sports, public health, drainage and irrigation, among others. Yet again, the State Legislature shall not legislate on those matters in the Concurrent List, such that they are inconsistent with what the Federal Parliament has already legislated in the latter's exercise of its power pursuant to the Concurrent List. If such a situation arises, the provisions of the Federal Parliament shall prevail over the inconsistent State Legislature's provisions (see art. 75 of the FC).

[34] Inherent in this contentious issue between the parties in this application, would be the proper extent to which the preclusion clause ought to operate, in the circumstances of this case. The learned SFC had submitted that the impugned provision was not identical with the provision under s. 377A of the Penal Code, which would be apparent, if the former was to be juxtaposed next to the latter. To this, learned counsel for the applicant had responded by saying that one would have to look at the 'pith and substance'

of the provisions under scrutiny. Briefly, according to the doctrine of 'pith and substance', where the question arises in determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. That would have to be ventilated before the fuller apex court panel that will hear the substantive application. As was observed by learned counsel for the applicant, in *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197; [1988] 1 MLJ 119, this court did not consider the preclusion clause in item 1, State List in the FC. Perhaps, in that case, there was no need for their Lordships then, to consider the preclusion clause on the factual matrix as presented before them.

Conclusion

[35] Viewing this application in its totality, I am of the considered view that this is application has fulfilled the two requirements, namely [i] that leave is required and necessary as the applicant had shown that this complaint of his involved the question of competency of the LSS to legislate on a matter that is on the Federal List; and [ii] this application has not been one that could, in all fairness, be termed as frivolous or an abuse of the court process. The applicant had shown that he had an arguable case. Leave ought to be granted in this application before me, so as to allow, borrowing the words of Mohd Azmi Kamaruddin SCJ in *Mamat Daud* case (1986) (*supra*) "the applicants should be allowed to canvass their case before the full court on the constitutionality and validity" of the impugned provision. I therefore hereby grant the application for leave in terms, as per encl. 1.

[36] I am of the view as well that costs ought to be in the cause. That, I so order now.